

AMENDED IN SENATE JUNE 28, 2005

AMENDED IN ASSEMBLY APRIL 25, 2005

CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

ASSEMBLY BILL

No. 1665

Introduced by Assembly Member Laird

February 22, 2005

~~An act to amend Section 8521 of the~~ *An act to add Section 1867 to the Code of Civil Procedure, to add Chapter 12 (commencing with Section 10109) to Part 1 of Division 2 of the Insurance Code, to amend Section 8521 of, and to add Sections 8523, 8612, and 8613 to, and to add Chapter 9 (commencing with Section 9100) to Part 4 of Division 5 of, the Water Code, relating to flood control.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1665, as amended, Laird. Flooding.

(1) *Existing law provides for the payment of compensation for the taking of land in an action by the owner in inverse condemnation.*

This bill would require a court, in cases involving allegations of inverse condemnation as a result of flooding, to determine whether there was an unreasonable plan or policy adopted by a public agency that resulted in flood damage to the plaintiff, based on the consideration of specified factors.

(2) *Existing law prohibits a policy of residential property insurance from being issued or delivered unless the named insured is offered coverage for loss or damage caused by the peril of earthquake.*

This bill would prohibit a policy of residential or commercial property insurance for any residential or commercial property located in a levee inundation zone from being issued or delivered or, with respect to policies in effect on January 1, 2006, from being renewed

by any insurer unless the named insured is offered coverage for loss or damage by the peril of flooding under the federal National Flood Insurance Act of 1968.

(1)

(3) Existing law establishes the 7-member Reclamation Board in the Department of Water Resources (department). Existing law authorizes the Reclamation Board to engage in various flood control activities along the Sacramento River, San Joaquin River, their tributaries, and related areas. Existing law requires the Reclamation Board to establish and enforce standards for the maintenance and operation of, and to undertake other responsibilities with regard to, flood control works under its jurisdiction.

This bill would rename the Reclamation Board the Central Valley Flood Control Board and would require that board to take steps to ensure improved safety of levees in the Central Valley. *The bill would authorize the board to create an environmental mitigation and enhancement bank for work on project levees, as defined, if the board determines it would likely be more cost-effective or environmentally beneficial than developing mitigation on a project-by-project basis. The bill would require the board to cooperate with state, federal, and local agencies to develop and maintain procedures to reduce or eliminate economic waste and to increase the efficient use of public and private funds in securing environmental permits required for work on project levees. The bill would require the department to prepare, on or before January 1, 2010, an update of the existing plan of flood control, as prescribed, and transmit the updated plan to local agencies, cities, and counties located in the affected watersheds. The bill would require the department to annually prepare a plan and schedule for mapping and remapping selected flood plains and areas located in the Central Valley.*

The bill would require a local agency that has flood water planning and protection duties or responsibilities for project levees to prepare a flood water management plan or update an existing plan on or before January 1, 2008, and every 2 years thereafter, and to file a copy of its plan with specified entities, thereby imposing a state-mandated local program. The bill would require the board, upon receipt of a local agency plan, to prepare a written notice of flood hazard, as prescribed, and submit the notice to the county assessor. The bill would require any county that includes a project levee to include a written notice of flood hazard prepared by the board with

the annual property tax assessment of each landowner determined by the board to be located in the inundation zone of a project levee.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 1867 is added to the Code of Civil*
2 *Procedure, to read:*

3 *1867. In cases involving allegations of inverse condemnation*
4 *as a result of flooding, the court shall determine whether there*
5 *was an unreasonable plan or policy adopted by a public agency*
6 *that resulted in flood damage to the plaintiff. It is the intent of the*
7 *Legislature that the court evaluate the specific policy decisions*
8 *made by the relevant public agency and determine whether those*
9 *policy decisions unfairly resulted in the plaintiff incurring*
10 *damages as a result of flooding. In evaluating the reasonableness*
11 *of a public agency plan or policy, the court shall consider all of*
12 *the following factors:*

13 *(a) The degree to which the plaintiff's loss is offset by*
14 *reciprocal benefits. If the plaintiff, absent the flood control*
15 *facilities at issue, would own property subject to repeated*
16 *flooding, then the court shall consider the repeated benefits*
17 *received by the plaintiff from the relevant facilities, and shall*
18 *weigh the value of those historical benefits against the damage to*
19 *the plaintiff. The court shall consider any increase in the value of*
20 *the plaintiff's property as a result of the flood protection received*
21 *by the plaintiff since the construction of the flood control*
22 *facilities.*

23 *(b) The availability to the public agency of feasible*
24 *alternatives with lower risks. The court shall examine the policy*
25 *decisions made by the relevant public agency, with due*

1 consideration to the other alternatives available to that public
2 agency at the time of the decision, including a consideration of
3 relative costs, expected benefits, available financing, and
4 physical feasibilities. The court's consideration shall be based
5 upon the information available, and the relative degree of
6 scientific certainty, at the time that the public agency made its
7 decision.

8 (c) The severity of the plaintiff's damage in relation to
9 risk-bearing capabilities. The court shall consider the damage
10 incurred by plaintiff and evaluate whether the plaintiff had the
11 capability to minimize its risks through physical actions,
12 including, but not limited to, elevating structures or the purchase
13 of insurance. This factor shall require the court to determine the
14 risk-bearing capability of the plaintiff, not whether the plaintiff
15 effectively minimized its risk.

16 (d) The extent to which damage of the kind the plaintiff
17 sustained is generally considered to be a normal risk of land
18 ownership. If a plaintiff has chosen to live in a flood plain, the
19 court shall evaluate the historical status of that flood plain, the
20 fact that levees were constructed in an effort to reduce the risk of
21 living in that flood plain, and the fact that levees can only
22 reduce, and not eliminate, the risk of flooding.

23 (e) The degree to which similar damage is distributed at large
24 over other beneficiaries of the project, or is particular only to the
25 plaintiff. Where the plaintiff alone, or in a limited group, suffered
26 damage as a result of a flood control structure that provided
27 benefits to many people at the expense of those injured, the court
28 shall consider whether the public agency made a policy decision,
29 which unfairly burdened the few and provided protection for
30 those remaining. This factor also requires the court to consider
31 whether the plaintiff, if the plan is found to be reasonable, will
32 contribute more to the public undertaking than the plaintiff's
33 proper share as a member of the public.

34 (f) In cases of upstream development contributing to
35 downstream damage through increased runoff, whether the
36 efforts of the upstream public agency in approving the
37 development were reasonable in light of the potential for damage
38 posed by the development, including the cost to the public entity
39 of reasonable measures to prevent downstream damage. The
40 court shall consider the cumulative impacts of all upstream

1 *development and whether those cumulative impacts were*
2 *considered by the upstream public agency. Reasonable measures*
3 *that might be taken by an upstream public agency include, but*
4 *are not limited to, the construction and operation of holding*
5 *basins to lessen the surge flow associated with storm runoff.*

6 *(g) In cases of upstream development contributing to*
7 *downstream damage through increased runoff, the availability*
8 *and cost to the downstream plaintiff of reasonable measures for*
9 *protecting the downstream plaintiff's property from damage. In*
10 *this regard, the court shall consider whether the downstream*
11 *plaintiff understood the risks associated with not taking an*
12 *action, whether the downstream plaintiff's structures predated*
13 *the upstream development, the financial capability of the*
14 *downstream plaintiff to take any actions, and the physical*
15 *feasibility of the plaintiff providing additional protection.*

16 *(h) The likelihood of public works not being undertaken*
17 *because of liability resulting from unseen and unforeseeable*
18 *possible direct physical damage to real property. The court shall*
19 *evaluate whether the imposition of liability will discourage the*
20 *construction of additional flood control works effectively*
21 *designed to provide flood protection for state citizens.*

22 *(i) Whether the plaintiff suffered direct physical damage to*
23 *property as a result of the flood control structure operating as*
24 *deliberately planned and carried out, or whether the damage was*
25 *as a result of a flood event which overwhelmed the flood*
26 *protection structure or due to an unforeseen defect in the flood*
27 *control structure. The court shall give due consideration to*
28 *imposing liability in circumstances in which the public agency*
29 *was aware of the likelihood of a failure of the flood control*
30 *structure in the circumstances in which the damage actually*
31 *occurred. The court shall weigh this factor in favor of the public*
32 *agency if it determines that the actual cause of the damage was,*
33 *at the time the public agency approved the flood control plan,*
34 *considered extremely unlikely.*

35 *(j) In considering each of the previous factors, the court shall*
36 *consider the degree to which the cost of the plaintiff's damage*
37 *can best be absorbed by the taxpayers of the defendant public*
38 *agency as a whole rather than by the individual plaintiff.*

39 *SEC. 2. Chapter 12 (commencing with Section 10109) is*
40 *added to Part 1 of Division 2 of the Insurance Code, to read:*

CHAPTER 12. FLOOD INSURANCE

10109. (a) No policy of residential or commercial property insurance for any residential or commercial property located in a levee inundation zone may be issued or delivered or, with respect to policies in effect on January 1, 2006, may be renewed by any insurer unless the named insured is offered coverage for loss or damage by the peril of flooding under the National Flood Insurance Act of 1968 (42 U.S.C. Sec. 4001 et seq.), as amended.

(b) The required offer shall include a written description and a graphical representation or map, provided by the department, showing the approximate location of the residential or commercial property in the levee inundation zone. The written description shall include the estimated level of inundation and any other information determined by the board. The city, county, or flood management agency shall be responsible for the preparation of the written description and the distribution of the description and graphical representation or map required by this section.

(c) As used in this section:

(1) "Commercial property insurance" means commercial multiperil, commercial property, special multiperil, and commercial comprehensive multiperil insurance and any and all other types of insurance policies that insure against loss or damage to real or personal property used in the conduct of a commercial or industrial enterprise located in the levee inundation zone.

(2) "Levee inundation zone" means the area protected by a levee that would be flooded if the levee were to overtop with unlimited flows, with boundaries as determined by the Central Valley Flood Control Board.

(3) "Policy of residential property insurance" means a policy insuring individually owned residential structures of not more than four dwelling units, individually owned condominium units, or individually owned mobile homes, and their contents, located in this state and used exclusively for residential purposes or a tenant's policy insuring personal contents of a residential unit located in this state. "Policy of residential property insurance," as defined, does not include either of the following:

1 (A) Insurance for real property or its contents used for any
2 commercial, industrial, or business purpose, except a structure of
3 not more than four dwelling units rented for individual
4 residential purposes.

5 (B) A policy that does not include any of the perils insured
6 against in a standard fire policy.

7 SECTION 1.—

8 SEC. 3. Section 8521 of the Water Code is amended to read:

9 8521. (a) “Board” means the Central Valley Flood Control
10 Board. Any reference to the Reclamation Board in this code
11 means the Central Valley Flood Control Board.

12 (b) The Central Valley Flood Control Board shall take steps to
13 ensure improved safety of levees in the Central Valley.

14 SEC. 4. Section 8523 is added to the Water Code, to read:

15 8523. “Project levee” means any levee or flood control work
16 located in the Sacramento and San Joaquin Watersheds and
17 constructed in cooperation with the United States.

18 SEC. 5. Section 8612 is added to the Water Code, to read:

19 8612. The board may establish an environmental mitigation
20 and enhancement bank for work on project levees, if the board
21 determines it would likely be more cost-effective or
22 environmentally beneficial than developing mitigation on a
23 project-by-project basis.

24 SEC. 6. Section 8613 is added to the Water Code, to read:

25 8613. The board shall cooperate with state, federal and local
26 agencies to develop and maintain procedures to reduce or
27 eliminate economic waste and to increase the efficient use of
28 public and private funds in securing environmental permits
29 required for work on project levees.

30 SEC. 7. Chapter 9 (commencing with Section 9100) is added
31 to Part 4 of Division 5 of the Water Code, to read:

32
33 CHAPTER 9. CENTRAL VALLEY FLOOD CONTROL PLAN

34
35 Article 1. General Provisions

36
37 9100. The Legislature finds and declares all of the following:

38 (a) The first plan of flood control for the Sacramento and San
39 Joaquin Rivers and their tributaries adopted by the Legislature
40 was based on the August 10, 1910 report of the California Debris

1 Commission. The plan for the Sacramento Valley envisioned
2 standardization of levee heights and construction of a system of
3 weirs and bypasses to relieve stress on the river levees. The plan
4 incorporated many existing local levees into the system.

5 (b) In the 1930's and 1940's, the plan was folded into the
6 Sacramento River Flood Control Project and in the legislative
7 acts that have amended and added to that project under the State
8 Water Resources Law of 1945 (Chapter 1 (commencing with
9 Section 12570) and Chapter 2 (commencing with Section 12630)
10 of Part 6 of Division 6).

11 (c) Until 1986, the plan of flood control called for the federal
12 government to design and construct channel rectifications, for
13 the state to provide the necessary land easements and rights of
14 way and act as nonfederal sponsor under federal law, and for
15 local government to maintain and operate the finished works to
16 federal standards and to hold and save the United States and the
17 state harmless from liability. The state has limited maintenance
18 responsibilities for system structures and flood channels under
19 Section 8361. After 1986, the plan changed only slightly to
20 require a nonfederal monetary contribution for the costs of
21 construction and local cost-sharing with the state on nonfederal
22 construction costs. Local maintenance and hold harmless
23 obligations have not changed.

24 (d) The plan recognized that an integral part of flood control
25 is patrolling and flood fighting in times of flood threat. By their
26 nature, levees, which are earthen embankments, cannot offer
27 complete protection from flooding, but can decrease its
28 frequency. As to the frequency of an expected flood event, the
29 protection afforded agricultural areas was lower than for urban
30 areas, but significantly higher than in the absence of the plan of
31 flood control. Population growth in agricultural areas outside
32 the control of the state has been addressed by state participation
33 in the floodway mapping and federal flood insurance program.

34 (e) The existing plan of flood control is a reasonable plan for
35 unifying an assortment of local flood protection levees and works
36 into a coherent system under the regulatory control of the board.
37 The plan has provided substantial flood control and economic
38 benefits over the decades that greatly exceeds the occasional
39 flood-related losses that could have been mitigated or offset
40 through the voluntary purchase of flood insurance.

Article 2. Flood Control Plan

9110. On or before January 1, 2010, the department shall prepare an update of the existing plan of flood control. The update shall address issues and conditions affecting flood water planning and management in the Central Valley and any other related topics. The department shall consult with public agencies that operate and maintain project levees in preparing and updating the report. The department shall transmit the updated plan to local agencies, cities, and counties located in the affected watersheds.

9111. The department shall annually prepare a plan and schedule for mapping and remapping selected flood plains and areas located in the Central Valley pursuant to Section 8326. The plan shall include an update of mapping projects in progress and shall include an estimated time for their completion.

9112. (a) Every local agency that has flood water planning and protection duties or responsibilities for project levees shall prepare a flood water management plan or update an existing plan on or before January 1, 2008, and every two years thereafter. The plan shall address current issues and conditions affecting its flood water planning and management duties, including levee design basis, design deficiencies, levee conditions and deficiencies, maintenance status and plans, funding adequacy, and any other related topics. The plan shall be based on available information and this section does not require that the local agency obtain additional information. If the information is not known, the local agency may report the information is not known or is otherwise unavailable. If the lands protected by state project levees are also protected by nonproject levees, the report shall include an assessment of both types of levees.

(b) The local agency, within 30 days after the date of adopting its plan, shall file a copy of its plan with each of the following entities:

- (1) The board.
- (2) Any city or county within the local agency jurisdiction.
- (3) Any city or county library located within the local agency jurisdiction.

1 (c) No later than 30 days after the date of adopting its plan,
2 the local agency shall make the plan available for public review
3 on the local agency's Internet Web site.

4 (d) The plan shall be included by reference in any residential
5 property disclosure documents created for the purpose of
6 offering property for sale or lease.

7 9113. Upon receipt of a local agency plan as required by
8 Section 9112, the board shall prepare a written notice of flood
9 hazard pursuant to Section 9120 and shall submit the notice to
10 the county assessor.

11
12 Article 3. Annual Local Agency Reports
13

14 9120. Any county that includes a project levee shall include a
15 written notice of flood hazard prepared by the board with the
16 annual property tax assessment of each landowner determined by
17 the board to be located in the inundation zone of a project levee.
18 The notice shall include statements regarding all of the
19 following:

20 (a) The property is located behind a levee.

21 (b) Levees reduce, but do not eliminate, the risk of flooding
22 and are subject to catastrophic failure.

23 (c) The level of flood risk and approximate maximum flood
24 depth if the levee fails, if known for the property.

25 (d) The landowner is advised by the state to have flood
26 insurance for any buildings on the property to protect the owner
27 from loss.

28 (e) Information about purchasing subsidized federal flood
29 insurance.

30 (f) The Internet address of the department Web site that
31 contains the levee status reports.

32 (g) Any other information determined by the department to be
33 necessary.

34 SEC. 8. If the Commission on State Mandates determines that
35 this act contains costs mandated by the state, reimbursement to
36 local agencies and school districts for those costs shall be made
37 pursuant to Part 7 (commencing with Section 17500) of Division
38 4 of Title 2 of the Government Code.

O